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No. 06-28

In the Supreme Court of the United States

JANET LUTKEWITTE, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes an employer strictly liable for a supervisor's sexual harassment of a subordinate when the employee did not experience a significant change in employment status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 436 F.3d 248.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2006. On May 1, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 3, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of em-

ployment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). That prohibition encompasses a claim that a supervisor sexually harassed a subordinate. See *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 63-67, 73 (1986).

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), the Court established the standards for deciding when an employer is liable for a supervisor's sexual harassment. When a supervisor has not taken a tangible employment action against a subordinate, an employer may avoid liability by demonstrating (1) "that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807. When a supervisor has taken a tangible employment action against a subordinate, however, the employer is strictly liable for the supervisor's actions. *Id.* at 808; *Ellerth*, 524 U.S. at 765. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761.

2. Petitioner served as a Supervisory Computer Specialist for the Federal Bureau of Investigation (FBI). Pet. App. 14a. Her supervisor was David Ehemann. *Ibid.* In January 1999, Ehemann directed petitioner to travel to New York on FBI business. *Ibid.* During petitioner's stay in New York, Ehemann pressured her into undesired sexual intimacies. *Id.* at 14a-15a. Following the New York trip, Ehemann pursued petitioner, and he

engaged in such acts as kissing her during work, following her, sending her personal e-mails, and rubbing up against her. *Id.* at 15a. Petitioner never told Ehemann to stop, but she did try to discourage him and avoid him. *Ibid.*

In 1998, before the New York trip, Ehemann began allowing petitioner to receive overtime pay in cash rather than in a mix of cash and compensatory time off. Pet. App. 16a-17a. Also prior to the New York trip, Ehemann allowed petitioner to use an FBI vehicle as a take-home car. *Id.* at 17a. In 1999, after the New York trip, Ehemann provided petitioner with a new model car for her use. *Ibid.* Also in 1999, Ehemann allegedly assisted petitioner by telling her she could write her own recommendation for a promotion and by increasing the staff that reported to her. *Ibid.* Petitioner did not write the recommendation, however, and she did not receive a promotion. *Id.* at 8a, 17a.

The FBI has a policy against sexual harassment. Pet. App. 15a. Petitioner did not report Ehemann's alleged harassment of her, however, until October 1999. *Ibid.* After a prompt investigation, Ehemann was immediately reassigned to a different office. *Ibid.* Other disciplinary measures were recommended, but Ehemann retired before they could be implemented. *Ibid.*

3. Petitioner filed suit in federal district court against the FBI, alleging that she was subjected to sexual harassment in violation of Title VII. Pet. App. 2a. At trial, petitioner proposed "tangible employment action" instructions under which the FBI would be held strictly liable for Ehemann's conduct if the jury were to find either that (1) Ehemann used his authority to compel petitioner to go on the New York trip, (2) Ehemann's conduct would have led a reasonable person to believe

that she would suffer adverse job consequences if she did not submit to his sexual advances; or (3) Ehemann gave petitioner favorable job benefits because she submitted to his sexual advances. *Ibid.* The district court declined to give any of those instructions. *Id.* at 3a.

After a trial, the jury issued a special verdict, concluding petitioner had been subjected to a hostile work environment. Pet. App. 3a. The jury also found, however, that the FBI exercised reasonable care to prevent and correct the harassment and that petitioner unreasonably failed to avoid harm. *Ibid.* A verdict was therefore entered in favor of the FBI. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-48a. The court rejected petitioner's contention that the district court erred in failing to give petitioner's proposed tangible employment action instructions. *Id.* at 5a-6a. The court concluded that Ehemann's directive to petitioner to go to New York was not a tangible employment action, because it did not condition petitioner's job or benefits on submission to Ehemann's advances. *Id.* at 6a. The court concluded that petitioner's second proposed tangible employment action instruction was not warranted because petitioner had offered no evidence that Ehemann either explicitly or implicitly conditioned her job on submission to his sexual advances. *Ibid.*

The court also rejected petitioner's primary contention on appeal—that the district court erred in failing to instruct the jury that it should hold the FBI strictly liable if it found that petitioner received job-related benefits as a result of her submission to petitioner's sexual advances. Pet. App. 6a-11a. The court concluded that the benefits that petitioner had identified were not evidence of a tangible employment action and that the record did not support petitioner's claim that the benefits

she obtained were conditioned on her submission to Ehemann's sexual advances. *Id.* at 7a.

In particular, the court determined that the new car that petitioner received in 1999 did not amount to a significant change in her status because she already had a take-home car before. Pet. App. 7a. The court also concluded that petitioner had not introduced any evidence that Ehemann's approval of her access to a new car was conditioned on her submission to his sexual advances. *Id.* at 8a. The court determined that Ehemann's alleged effort to put petitioner in a position to receive a promotion did not rise to the level of tangible employment action because petitioner never received a promotion, and because petitioner failed to introduce any evidence that increasing her staff was a significant step toward promotion. *Ibid.* The court determined that any increase in approved overtime began before the harassment and did not result from petitioner's submission to Ehemann's advances. *Id.* at 9a.

Because the court of appeals concluded that petitioner had failed to introduce evidence that any significant change in employment status resulted from Ehemann's conduct, it declined to address whether an employer may ever be held strictly liable in a submission case. In particular, the court declined to decide whether benefits that are given to an employee who submits to a supervisor's sexual advances can constitute tangible employment actions or whether submission in the face of *quid pro quo* harassment itself constitutes a tangible employment action. Pet. App. 10a. The court explained that those issues were not addressed by the district court, and stated that it "should decide these important questions only when the facts the plaintiff presents demand their resolution." *Id.* at 10a-11a.

Judge Brown concurred in the judgment. Pet. App. 11a-48a. She concluded that an employer may not be held strictly liable when an employee submits to a supervisor's harassment. *Ibid.*

ARGUMENT

The court of appeals' per curiam decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. An employer is strictly liable for a supervisor's harassment of an employee only when the harassment "culminates in a tangible employment action." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 765 (1998); *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 808 (1998). When a supervisor's harassment of an employee has not culminated in a tangible employment action, an employer may avoid liability for a supervisor's sexual harassment by proving (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 807. For those purposes, the Court has defined a "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761.

Applying that standard, the court of appeals in this case correctly held that petitioner had failed to establish any basis for imposing strict liability on the FBI for Ehemann's harassment of petitioner. The actions of

directing an employee to go on a business trip, providing a new car when the employee already had a take-home car, and helping to put an employee in a position to receive a promotion when no promotion occurs do not have a significant effect on employment status. Pet. App. 6a-8a. And while increased overtime can constitute a significant change in employment status, petitioner failed to show that her submission to Ehemann's advances led to an increase in approved overtime. *Id.* at 9a. Thus, as the court of appeals concluded, "there is no evidence of a tangible employment action." *Id.* at 10a.

2. Petitioner does not challenge the court of appeals' fact-based determination that she failed to establish that any of her supervisor's alleged harassing actions significantly changed her employment status. Instead, she contends (Pet. 14-20) that review is warranted on the theory that *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), substantially expanded the concept of a tangible employment action to include any "official act" performed by a supervisor, regardless of whether it has a significant impact on employment status. Petitioner asserts (Pet. 28) that she experienced a tangible employment action under that more expansive standard.

Petitioner's reading of *Suders*, however, is mistaken. In reliance on *Ellerth* and *Faragher*, the Court in *Suders* held that an employer is strictly liable for a supervisor's action in causing a constructive discharge when the act precipitating the constructive discharge constitutes a tangible employment action. 542 U.S. at 134, 147-150. In contrast, the Court held that when the act precipitating the constructive discharge does not constitute a tangible employment action, an employer may avoid liability by proving the *Ellerth* and *Faragher* affirmative defense. *Ibid.*

In reaching those conclusions, the Court did not depart from *Ellerth*'s definition of a tangible employment action. To the contrary, the Court quoted with approval *Ellerth*'s holding that a tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Suders*, 542 U.S. at 144 (quoting *Ellerth*, 524 U.S. at 761). Consistent with its approval of that standard, the Court in *Suders* stated that an employer would be strictly liable for a constructive discharge when it is precipitated by "a humiliating demotion, extreme cut in pay, or transfer to a position in which [an employee] would face unbearable working conditions." *Id.* at 134. Each of those actions clearly qualifies as a significant change in employment status and therefore a tangible employment action.

The Court in *Suders* also referred to a tangible employment action as an official act. See 542 U.S. at 149. But the use of that term did not fundamentally expand the meaning of tangible employment action adopted in *Ellerth* so as to encompass for the first time actions that do not significantly alter employment status to begin with. Instead, the Court's use of that term tracks the fact that *Ellerth* itself had described an action that significantly changes employment status as an official act. *Id.* at 144 (citing *Ellerth*, 524 U.S. at 762). The Court in *Suders* was simply using the term "official act" in the same way as it had in *Ellerth*—to refer to official actions that significantly change employment status. *Ibid.* Nothing in *Suders* supports petitioner's view that *Suders*, without explanation, vastly expanded the category of actions for which an employer could be strictly

liable to include actions that do not have a significant impact on employment status.

Thus, there is no inconsistency between this Court's decisions, as petitioner claims (Pet. 20). Under *Suders*, as under *Ellerth*, strict liability arises only when a supervisor's harassment of an employee culminates in a significant change in employment status.

3. Petitioner likewise errs in contending (Pet. 21-27), that the circuits are divided on that issue. No circuit has adopted petitioner's view that official action triggers strict liability even when it does not result in a significant change in employment status. Petitioner contends (Pet. 22-24) that the Second and Ninth Circuits have adopted that view, but the decisions cited by petitioner do not support that contention.

In *Ferraro* v. *Kellwood Co.*, 440 F.3d 96, 101 (2d Cir. 2006), the Court read *Faragher* and *Ellerth* to make the exercise of official power a prerequisite to strict liability. The court did not suggest, however, that strict liability could arise absent proof that an official exercise of power resulted in a significant change in employment status. Indeed, in the course of ruling against the plaintiff in that case, the court identified only two tangible employment actions that had been taken against the plaintiff, a demotion and reduction in pay, and both clearly constituted a significant change in employment status. *Id.* at 102.

In *Jin* v. *Metropolitan Life Ins. Co.*, 310 F.3d 84 (2002), the Second Circuit held that an employer is strictly liable when a supervisor threatens to fire an employee who does not submit to his sexual demands, the employee submits, and the supervisor then allows the employee to retain her job. The court did not reach that conclusion based on petitioner's view that strict liability

arises from an assertion of supervisory power that does not significantly change employment status. Instead, it reached that conclusion based on its view that a supervisor who conditions an employee's *job* on her submission to his sexual demands "uses his authority to effect * * * 'a significant change in employment status.'" *Id.* at 96 (quoting *Ellerth*, 542 U.S. at 761).

For similar reasons, the Ninth Circuit's decision in *Holly D.* v. *California Institute of Technology*, 339 F.3d 1158 (2003), provides no support for petitioner's position. In that case, the Ninth Circuit, like the Second Circuit, held that an employer is strictly liable for a supervisor's conduct in coercing an employee to submit to his sexual demands through a threat of discharge. In reaching that conclusion, however, the Ninth Circuit did not adopt petitioner's position that a supervisor's assertion of official authority is sufficient to render an employer strictly liable, even when there has been no significant change in employment status. Instead, the court based its holding on the view that in a submission case, "the participation in unwanted sexual acts becomes a condition of the employee's employment—a critical condition that effects a substantial change in the terms of that employment." *Id.* at 1169.

Other decisions from the Second and Ninth Circuits have similarly adhered to *Ellerth*'s holding that a significant change in employment status is a necessary predicate for imposing strict liability on an employer. See, *e.g.*, *Schiano* v. *Quality Payroll Sys., Inc.*, 445 F.3d 597, 604 (2d Cir. 2006); *Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 951, 960-961 (9th Cir. 2004).

Petitioner is also mistaken in contending (Pet. 24) that the Sixth Circuit has adopted an intermediate position on strict liability that does not require proof of a

significant change in employment status. The case cited by petitioner, *Collette* v. *Stein-Mart, Inc.*, 126 Fed. Appx. 678, 682 (2005), uses the phrase "adverse official act," but that description, without more, does not suggest that the Sixth Circuit intended to water down the *Ellerth* standard. In any event, the case cited by petitioner is unpublished. Published Sixth Circuit decisions adhere to *Ellerth*'s holding that strict liability arises only when there has been a significant change in employment status. See, *e.g.*, *Keeton* v. *Flying J, Inc.*, 429 F.3d 259, 263 (6th Cir. 2005), cert. denied, No. 05-1550 (Oct. 2, 2006).

4. Petitioner also contends (Pet. 27) that review is warranted in this case to decide whether a significant change in employment status must be *adverse* to the plaintiff in order to serve as a predicate for strict liability. That question arises in a submission case when the plaintiff relies on the theory that the tangible actions that trigger strict liability are the benefits she receives after submitting to a supervisor's sexual demands. Such benefits could not constitute a significant change in employment status if a tangible action must be adverse to the plaintiff.

Review of the question whether a tangible employment action must be adverse to the plaintiff is not warranted in this case, because the court of appeals did not resolve that issue. While petitioner claimed that she received substantial new benefits as a result of her submission to her supervisor's sexual advances, the court of appeals concluded that petitioner failed to prove that claim. As discussed above, with respect to the benefits that petitioner identified, the court concluded either that the benefit did not effect a substantial change in status, that petitioner did not receive the benefit as a result of

her submission to her supervisor's sexual advances, or both. Pet. App. 6a-9a. For that reason, the court below expressly refrained from deciding "whether benefits can constitute tangible employment actions." *Id.* at 10a. Because the court below did not decide whether a tangible employment action must be adverse to the plaintiff, that question is not properly presented here.

Finally, this case provides an ill-suited vehicle to address the broader issues raised by petitioner. As the court of appeals explained in its per curiam opinion, "[t]he District Court did not issue an opinion in this case and the parties did not squarely address these larger issues in their briefs or in arguments to this court." Pet. App. 11a. The lack of a more developed record on these legal issues in the courts below provides an additional and independently sufficient basis to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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